

DEC 10 2007

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MEDIAC PRODUCTIONS, an unknown  
entity; CHARLES SUBLETT, an  
individual; JUNY SUBLETT, an  
individual,

Counter-claimants,

v.

YEVGENY LYUBER; IRINA UGORIC,  
individuals,

Defendants - Appellees,

and

KURT PENBERG,

Counter and cross-claim  
defendant,

v.

KID SONGS FOR YOU, LLC, a Delaware  
corporation; ROBERT L. MUDD, an  
individual; JAMES STEVEN LAWLESS,  
JR., an individual,

No. 05-55619

D.C. No. CV-03-00923-VAP

MEMORANDUM<sup>\*</sup>

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Plaintiff-cross-defendants - Appellants.
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Appeal from the United States District Court  
for the Central District of California  
Virginia A. Phillips, District Judge, Presiding

Submitted December 3, 2007\*\*  
Pasadena, California

Before: T.G. NELSON, PAEZ, and BYBEE, Circuit Judges.

Robert Mudd and James Lawless appeal from the district court's order setting aside the default judgment entered against defendants Lyuber and Ugoric and dismissing their copyright infringement action. We have jurisdiction under 28 U.S.C. § 1291. We review for abuse of discretion. *Eminence Capital v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (dismissal with prejudice); *Brady v. United States*, 211 F.3d 499, 503–04 (9th Cir. 2000) (reviewing decision to set aside default for abuse of discretion). We vacate and remand for further proceedings.

The district court abused its discretion by setting aside the default judgment as to Ugoric and dismissing the claims against her under Fed. R. Civ. P. 12(b)(5) without considering appellants' proof of service showing Ugoric was timely served

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\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

by a third-party service processor. *Cf. Puett v. Blandford*, 912 F.2d 270, 276 (9th Cir. 1990) (finding district court abused its discretion by dismissing case based on insufficient service without considering all of the evidence of service submitted). The district court's order does not articulate why the proof of service filed by a third-party service processor was insufficient to demonstrate that Ugoric had been served or whether the court even considered the proof of service in making its decision.

The district court also abused its discretion by dismissing with prejudice the claims against Lyuber. The district court did not provide any reason why dismissal as to Lyuber was with prejudice. *See Eminence Capital*, 316 F.3d at 1052 (“[D]istrict court’s failure to consider the relevant factors and articulate why dismissal should be with prejudice instead of without prejudice may constitute an abuse of discretion.”). Thus, the district court should have dismissed the action as to Lyuber without prejudice. *See United States v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc.*, 366 F.3d 767, 772 (9th Cir. 2004) (“If the court declines to extend the time for service of process, the court shall dismiss the suit without prejudice.”)

We therefore vacate the judgment as to Ugoric and remand for the district court to consider plaintiffs' proof of service. We vacate the judgment as to Lyuber and remand for the district court to allow plaintiffs to re-serve Lyuber.

Appellants shall bear their own costs on appeal.

We grant Appellants' motion to preclude Appellees from filing an answering brief and deny their request for sanctions against Appellees.

**VACATED and REMANDED.**